

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Adelphia Cable Communications	)	CSR 6390-E
	)	CSR 6394-E
Petitions for Determination of Effective	)	
Competition in Fullerton and Santa Monica,	)	
California	)	
	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 2, 2007**

**Released: March 5, 2007**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Adelphia Cable Communications, on behalf of its affiliates (“Adelphia”),<sup>1</sup> has filed two petitions with the Commission pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the rules for a determination that its cable systems serving Fullerton and Santa Monica, California (the “Franchise Areas”) are subject to effective competition pursuant to Section 623(a)(1) the Communications Act of 1934, as amended, (“Communications Act”), and are therefore exempt from rate regulation.<sup>2</sup> Both the City of Fullerton and the City of Santa Monica (the “Cities”) have filed oppositions and Adelphia has filed replies.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>3</sup> as that term is defined by Section 623(1) of the Communications Act of

<sup>1</sup> Comcast Corporation and Time Warner recently acquired the assets of Adelphia Communications Corporation. *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner, Inc.; Transferee; Time Warner, Inc., Transferor, to Comcast Corporation, Transferee*, 21 FCC Rcd 8203 (2006). As part of that proceeding, the parties requested that the Commission’s grant of its consent to the transactions include and accommodate, as appropriate, applications that will have been filed by such licensees relating to such cable systems that are pending at the time of the consummation of the transactions. In this matter, we also will take that to include pending petitions for effective competition. Therefore, the action we take in this proceeding will transfer to the successor-in-interest, either Comcast or Time Warner, as it relates to these Franchise Areas.

<sup>2</sup> 47 U.S.C. § 543(a)(1).

<sup>3</sup> 47 C.F.R. § 76.906.

1934, as amended, and Section 76.905 of the Commission's rules.<sup>4</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>5</sup>

## II. DISCUSSION

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD"), each of which offer comparable programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the franchise area.<sup>6</sup> Turning to the first prong of this test, we find that the DBS service of DIRECTV, Inc. ("DIRECTV") and DISH Network ("DISH") is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware that the service is available.<sup>7</sup> The two DBS providers' subscriber growth reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DIRECTV has become the second largest, and DISH the third largest, MVPD provider.<sup>8</sup> In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in each of the Franchise Areas are DBS subscribers, we conclude that the population of the Franchise Areas at issue here may be deemed reasonably aware of the availability of DBS service for purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer substantially more than 12 channels of video programming, including more than one non-broadcast channel.<sup>9</sup> We find further that Adelphia has demonstrated that the Franchise Areas are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the Franchise Areas. Therefore, the first prong of the competing provider test is satisfied.

4. We do not agree with the Cities' contention that it is impossible to determine if Adelphia's petitions meet the first prong of the competing provider effective competition test because Adelphia refused their Request for Information ("RFI") to solicit information about what the Cities claim is relevant for a determination of effective competition.<sup>10</sup> The Cities claim that Adelphia's refusal to address the RFI makes it difficult to determine whether comparable programming is offered and whether any regulatory, technical, or other impediments exist within the Franchise Areas, particularly since the Cities allege that 46 percent of Fullerton's households and 70 percent of Santa Monica's households are occupied by renters.<sup>11</sup> First, we find the Cities' complaint regarding Adelphia's failure to comply with a RFI not material to this proceeding

<sup>4</sup> See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

<sup>5</sup> See 47 C.F.R. §§ 76.906 & 907.

<sup>6</sup> 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>7</sup> See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>8</sup> *Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11 at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

<sup>9</sup> See 47 C.F.R. § 76.905(g).

<sup>10</sup> Fullerton Opposition at 2-3; Santa Monica Opposition at 2-3.

<sup>11</sup> Fullerton Opposition at 2; Santa Monica Opposition at 2.

because we do not believe such a discovery request is necessary based on the clear facts of the record. Second, we do not find it is incumbent upon Adelphia to provide detailed information relating to service impediments for an effective competition determination in these cases.<sup>12</sup> In addition, the Cities do not identify anything unique about the local topography that might impede DBS reception. Third, we find the Cities' argument without merit because whether households are comprised of renters or owners has no bearing on an effective competition determination. As stated above, the Commission presumes that DBS service is technically available due to its national satellite footprint. Accordingly, we find that Adelphia has demonstrated that both DIRECTV and DISH offer comparable programming and no impediments to service exist.<sup>13</sup>

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. The Cities did not dispute Adelphia's assertion that it is the largest MVPD provider in these Franchise Areas.<sup>14</sup>

6. Adelphia has provided a Media Business Corp. Enhanced Satellite Tracking Report showing the number of households for Fullerton, California.<sup>15</sup> Adelphia's Enhanced Satellite Tracking Report compared the Census block group level households within the franchise boundary to the Census block group level households in the respective zip codes as a whole, and allocated a proportion of DBS subscribers within each zip code to the Franchise Area.<sup>16</sup> The numbers of DBS subscribers were then compared to the 2000 Census household data to determine the number of households served by DBS providers, demonstrating that the DBS providers collectively have attained a subscriber penetration level of 16.19 percent in Fullerton.<sup>17</sup> Adelphia also purchased a Satellite Broadcasting and Communications Association Effective Competition Tracking Report for Santa Monica, California, which reflected the number of DBS subscribers within the zip-plus-four zip codes associated with the franchise area, showing that penetration levels have reached 18.4 percent.<sup>18</sup>

7. In opposition, the Cities dispute Adelphia's DBS penetration figures on the grounds that they cannot effectively evaluate Adelphia's data since the cable company refused to comply with its RFI.<sup>19</sup> The Cities challenge Adelphia's DBS subscriber allocations because a substantial part of the Cities' cable households are renters.<sup>20</sup> As stated above, we reject the Cities' objection because the percentage of renters compared to home owners is immaterial here. Furthermore, the Cities' contention that renters are denied competitive options since they face bulk purchase contracts with cable providers is an allegation that cannot be evaluated here because the Cities have not provided evidence regarding the number of households

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<sup>12</sup> Fullerton Opposition at 3-4; Santa Monica Opposition at 3-4.

<sup>13</sup> See *supra* ¶ 3.

<sup>14</sup> Santa Monica and Fullerton Petitions at 5 and Declaration of Andrew Elson, Vice President of Regulatory Accounting at Adelphia Communications.

<sup>15</sup> Fullerton Petition at 5-6 and Exhibit 4.

<sup>16</sup> *Id.* at 6 and Exhibit 4.

<sup>17</sup> *Id.* at 5 and Exhibit 4.

<sup>18</sup> Santa Monica Petition at 5 and Exhibit 4

<sup>19</sup> Fullerton Opposition at 2; Santa Monica Opposition at 2.

<sup>20</sup> *Id.*

subject to bulk contracts.<sup>21</sup> With regard to the Cities' argument that renters also are denied competitive options because of physical limitations to satellite antenna placement, we note that renters are entitled to attach DBS dishes pursuant to our OTARD rules.<sup>22</sup> In light of the above, we deny the Cities' request to defer action in these cases pending a Commission order requiring Adelphia to provide additional information as set out in their RFI.

8. We accept the data provided by Adelphia as establishing a reasonable basis for finding that DBS penetration exceeds 15 percent in these Franchise Areas. These penetration estimates provide a sufficient margin of error with respect to the 15 percent threshold established by the competing provider test, overcoming any concerns raised by unsupported arguments about DBS penetration imbalances in Fullerton and Santa Monica.

9. The City of Santa Monica also opposes Adelphia's petition because it believes Adelphia filed for a determination of effective competition as a "preemptive strike" against a rate order adopted by the City Council.<sup>23</sup> This argument is immaterial in the present context. A cable operator is entitled to bring a claim of effective competition at any time. If the cable operator prevails on its claim, it is no longer subject to rate regulation.

### III. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition in Fullerton and Santa Monica, CA filed by Adelphia Cable Communications **ARE GRANTED**.

11. **IT IS FURTHER ORDERED** that the certifications to regulate basic service rates granted to any local franchising authorities overseeing Adelphia Communications in the affected Franchise Areas **ARE REVOKED**.

12. This action is taken pursuant to delegated authority under Section 0.283 of the Commission's rules.<sup>24</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Deputy Chief, Policy Division  
Media Bureau

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<sup>21</sup> Fullerton Opposition at 3-4; Santa Monica Opposition at 3.

<sup>22</sup> *Id.*; see 47 C.F.R. § 1.4000.

<sup>23</sup> Santa Monica Opposition at 4.

<sup>24</sup> 47 C.F.R. § 0.283.

**ATTACHMENT A****File No. CSR 6390-E****File No. CSR 6394-E****FRANCHISE AREAS SERVED BY  
Adelphia Cable Communications on behalf of its Affiliates****Competing Provider Test**

<b>Franchise Area</b>	<b>2000 Census Household</b>	<b>DBS Subs Allocated</b>	<b>CPR: DBS Penetration Rate</b>
Fullerton, CA	43,609	7,059	16.19%
Santa Monica, CA	44,497	8,189	18.4%